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No. 95-1516

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY,

Petitioner,

v.

WILLIAM FRANKLIN FULKERSON, PAULINE FULKERSON, ALLSTATE INSURANCE COMPANY and MELINDA HERRENSMITH, Individually And As Mother Of Troy E. Cilone, Infant, and As Administratrix of the Estate of Troy E. Cilone, Deceased,

Respondents.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

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BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The Petitioner is Ford Motor Company.

The Respondents are William Franklin Fulkerson, Pauline Fulkerson, Allstate Insurance Company, and Melinda Herrensmith, Individually, as mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased. Kenneth L. Sales of Segal, Isenberg, Sales, Stewart, Cutler & Tillman is counsel of record for all Respondents. William A. Miller, Jr., is also counsel for Respondents, Melinda Herrensmith, Individually, as mother of Troy E. Cilone, Infant, and as Administratrix of the Estate of Troy E. Cilone, Deceased. A. Campbell Ewen of Ewen, Hilliard & Bush, is also counsel for Respondent, Allstate Insurance Company.

Each of the Respondents fully join in this Brief in Opposition, except Allstate. Allstate Insurance Company's position with respect to punitive damage is already a matter of record with this Court and remains unchanged. In this particular case, Allstate takes no position with respect to punitive damages, having been awarded none. No issues remain concerning liability and compensatory damages and Petitioner raises none here.

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BRIEF IN OPPOSITION

Respondents request the court deny the Petition for Writ of Certiorari seeking review of an unreported opinion of the Kentucky Court of Appeals. (For the convenience of the Court, all citations to the opinion will be to the opinion attached as App. 1a-10a to the Petition.)

COUNTER STATEMENT OF THE CASE

Petitioner commits the common mistake of reciting the evidence most favorable to its position, which the jury quite evidently did not believe, while ignoring contrary evidence that amply supports the jury verdict. Of particular importance, the record contains the following key evidence:

A. The Accident

In the early morning of June 2, 1985, seventeen-year-old Troy Cilone lost control of the 1984 Ford Ranger he was driving and crossed the center line into the path of the truck driven by William Fulkerson.[1] Cilone was killed and Fulkerson seriously injured, incurring medical expenses in excess of seventy-four thousand dollars ($74,000.00). A passenger in Cilone's vehicle testified he heard a loud noise, then heard Cilone shout, prior to loosing control of the Ranger. (Tape No. 2; 1/06/93; 10:32:50).

As the Kentucky appellate courts recognized in both the first and second trial of this action, Respondents presented ample evidence that the Ranger's left front wheel assembly separated from the vehicle prior to the collision. Five independent expert witnesses from the police department and coroner's office, conducted an official investigation of the scene immediately following the collision. Each concluded, based upon substantial physical evidence,[2] that

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[1] Ford notes the "closing speed" of the vehicles was between 80-90 mph. (Pet., p. 1). The closing speed was determined by combining the speeds of the vehicles at the time of the collision. Ford's accident reconstructionist estimated the Ranger to be traveling approximately 45 mph and Fulkerson's vehicle, approximately 35 mph, at the time of the accident. (Tape No. 11; 01/20/93; 16:19:55).

[2] A published opinion of the Kentucky Supreme Court resulting from the first trial described the "substantial evidence" introduced by the Plaintiffs at that trial. *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991). Substantial physical evidence at the scene included: various gouge and scrape marks on the roadway, running in the same direction the Ranger traveled, between 100 and 200 feet before the point of impact (Tape No. 2; 01/06/93; 13:46:50; 14:22:30; 16:37:5; Tape No. 5; 01/11/93; 15:29:44; 14:39:39); a brake shoe from Cilone's left front wheel found 198 feet prior to the point of impact (Tape No. 2; 01/06/93; 14:23:26); and other pieces of Cilone's vehicle, including rim pieces, a brake caliper arm, and wheel chrome, found at distances from 47 feet 7 inches to 152 feet 4 inches prior to the point of impact. (Tape No. 5;

the Ranger's wheel assembly was defective, causing the left front wheel to separate from Cilone's vehicle prior to impact. (Tape No. 2; 01/06/93; 14:40:39; Tape No. 3; 01/07/93; 11:36:30; Tape No. 4; 01/08/93; 09:09:40). Testimony of Ford's experts supported this conclusion.[3]

As the Kentucky appellate courts further recognized, Respondents produced ample evidence that the Ranger's left front wheel assembly separated because the wheel assembly was defectively designed and/or defectively manufactured.[4] In addition to the conclusions of five independ-

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01/11/93; 14:31:02). Dr. Alan Johnson, a metallurgist at the University of Louisville working with the coroner's office, also found extensive corrosion, pre-dating the collision, on the Ranger's spindle stem. (Tape No. 4; 01/08/93; 09:07:36).

[3] Ford expert, Richard Eisenberg, first testified the gouges and scrape marks observed by police and coroner's agents were not relevant to the determination of when the spindle separated from the vehicle. (Tape No. 11; 01/20/93; 14:17:40; 14:20:50; 14:25:00). On cross-examination, however, Respondents introduced deposition testimony from another action involving the wheel separating from a Ford Ranger in which Eisenberg used the lack of scrapes and gouges on the roadway to support his conclusion that the spindle did not separate prior to impact. *Scherer v. Ford Motor Co.*, Civil Action No. CV-91-B-00860-J, N.D. Alabama, Jasper Division. (Tape No. 11; 01/20/93; 14:21:27).

Ford employee and expert, James Varin, conceded gouges and scrape marks on the roadway were relevant to the determination of when the spindle separated, but admitted he did not consider this evidence in forming his opinion in this case. In fact, Varin testified he never looked at any photographs of the gouges and scrape marks on the roadway resulting from this accident prior to trial. (Tape No. 10; 01/19/93; 14:07:14).

[4] Petitioner notes the jury in the first trial returned a verdict in favor of Ford. Petitioner ignores, however, three very critical factors regarding the first trial: (1) the prior jury received improper instructions as to the criteria for finding a design defect; (2) the judge in the first trial improperly excluded evidence of design changes in the Ford Ranger's wheel assembly; and (3) Respondent did not discover, until after the first trial, the existence of design change request forms which demonstrated Ford's

ent experts from the police and coroner's office, Respondents presented the testimony of two expert engineers. Larry Bihlmeyer, a former Ford engineer involved in the development of the shrink-fit assembly designed for the Ford F-Series pickup and used on the Ford Ranger,[5] and John Stilson, another former Ford employee, likewise opined that the Ranger's wheel assembly was defectively manufactured and designed.[6]

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awareness of the risk attributable to the absence of a secondary retention feature. *Fulkerson, supra.* Evidence at the second trial was so overwhelming the jury unanimously determined the accident was caused by the defective wheel assembly of Cilone's Ford Ranger. (App. A).

[5] Ford notes "there was no evidence that *any* shrink-fit joint in *any* F-Series Truck had *ever* failed under *any* circumstances." (Pet., p. 2). Ford fails to mention, however, that the spindle stem used on the shrink-fit joint of the F-Series pickup contained a "nail head" secondary retention feature lacking on the shrink-fit assembly of the Ford Ranger.

[6] Bihlmeyer identified two design defects in the Ranger's wheel assembly: (1) the spindle shaft lacked a shoulder or head to insure retention of the spindle in the assembly (Tape No. 4; 01/08/93; 13:25:10), and (2) the area of the shrink-fit was too small, and therefore insufficient to provide the needed grip between the spindle shaft and assembly. (Tape No. 4; 01/08/93; 13:25:22). Bihlmeyer also testified as to five manufacturing defects: (1) the area of the shrink-fit was smaller than required by Ford's printed specifications; (2) Ford failed to properly test the spindle and wheel assembly in light of actual manufacturing specifications; (3) Ford violated its own standards, as well as generally accepted industry standards by failing to eliminate the hazard; (4) if the potential hazard from the lack of a secondary retention feature could not be eliminated through design or manufacturing changes, Ford failed to follow standard engineering practice in warning the public of the potential hazard; and (5) Ford failed to follow proper practices when Ford engineers foresaw and recognied the defect, but failed to correct it. (Tape No. 4; 01/08/93; 13:25:43).

Stilson, engineer, accident reconstructionist and former Ford employee, also concluded, based upon the physical evidence, that the Ranger's left front wheel assembly separated prior to impact as a result of Ford's defective manufacture and design. (Tape No. 6; 01/12/93; 11:13:20).

Ford entirely mischaracterizes the record with regard to the evidence presented in support of Respondent's claims for punitive damages. Ford would have this court believe the only evidence presented to show Ford acted with a wanton or reckless disregard for the safety of others was evidence that Ford subsequently improved its product to make it safer. The Kentucky appellate court recognized Respondents produced ample evidence that Ford knew, prior to the accident in this case, there existed a risk of wheel separation owing to the absence of a secondary retention feature.[7] Bihlmeyer testified Ford engineers involved in the design knew of the risk inherent in the shrink-fit process used to hold the spindle and wheel assembly, and incorporated the "nail head," as a secondary retention method. (Tape No. 4; 01/08/93; 11:09:31). In fact, while employed at Ford, Bihlmeyer was specifically instructed that no shrink-fit design should be developed without the "nail head" or some other secondary retention device. (Tape No. 4; 01/08/93; 13:29:01; 15:03:40).

Indeed, Ford initially designed the Ranger with a secondary retention feature, but eliminated the feature prior to manufacture in order to save production costs.[8] (Tape

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[7] The Kentucky trial court and court of appeals both considered and rejected Ford's argument concerning the sufficiency of the evidence. The trial court recognized Plaintiffs presented evidence that Ford knew of the risk inherent in the shrink-fit assembly, but chose to manufacture the vehicle without a secondary retention feature for cost saving purposes, despite the availability of a safer design. The trial court concluded the evidence sufficient to support the jury's award of punitive damages. (Pet. App. 11a-12a). In reviewing this case, the court of appeals unanimously concurred. (Pet. App. 6a-10a).

[8] Ford began changing the design of the Ranger's wheel assembly almost immediately after production began in 1982. (Tape No. 11; 01/20/93; 10:21:57). Ford changed the design two or three times between 1984 and 1988. (Tape No. 11; 01/20/93; 10:34:37). Respondents introduced product change request forms from Ford stating the change was requested because there was "no head on stem" and that the stem was being "swaged over to provide a

No. 4; 01/08/93; 13:49:05). Ford later (after sale of the Ranger involved in this case, but prior to the collision) redesigned the wheel assembly to include a secondary retention feature. Ford's own expert, James Varin, a Ford employee who described his job as "analyzing parts that may be the subject of [legal] claims," admitted the primary reason for changing the spindle design was to reduce Ford's liability exposure in the event of wheel separation.[9] Ford refused, however, to recall cars previously sold to install a safer design or to warn consumers who purchased these vehicles of the risk of wheel separation.

B. The Punitive Damage Instruction

Because this accident occurred in 1985, the court gave a punitive damage instruction based upon common law. In 1988, the Kentucky legislature enacted a punitive damage statute supplanting common law as to all accidents occurring after the statute's enactment. (App. B). Ford claims Kentucky's "traditional" (pre-1988) punitive damage instruction failed to satisfy the Due Process Clause of the Fourteenth Amendment to the United States Constitution. To preserve this issue for appeal, Ford tendered what they claimed was a proper instruction on punitive damages.

As the Kentucky Supreme Court recognized in its opinion reversing the first trial of this action, Kentucky takes a "bare bones" approach to jury instructions. *Fulkerson*, 812 S.W.2d at 122. The court explained:

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stem retention feature." Ultimately, Ford redesigned the Ranger's spindle stem to include the "nail head" featured on the original design. (Tape No. 4; 01/08/93; 11:36:56).

[9] Varin initially testified the primary reason for changing the spindle design was the cheaper manufacturing process. On cross-examination, Varin admitted testifying in *Scherer, supra* (another action involving wheel separation on a Ford Ranger), that the primary impetus for adding the secondary retention feature was *strictly* for purposes of post accident investigation. (Tape No. 10; 01/19/93; 11:45:40; 11:47:04).

> Unlike many jurisdictions that use pattern instructions, and otherwise explain the law of the case to the jury, the practice in Kentucky abjures the abstract and requires the trial court, applying (rather than stating), the underlying legal principles, to frame the dispositive issues.
>
> > 'Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire.' *Id.* (*Citing, Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974)).

In accordance with this practice, at the second trial the court gave a punitive damage instruction which framed the issue for the jury to decide as whether the accident was caused by the gross negligence of Ford.[10] The instruction defined "gross negligence" and explained that if they found Ford acted in such a manner, the jury, in their discretion, could award punitive damages. Pursuant to Kentucky law, Respondents were required, prior to trial, to specify the amount of punitive damages claimed in response to interrogatories submitted by Ford. Ky. R. Civ. P. 8.01. Accordingly, the verdict form limited the jury's award to an amount not exceeding $2,000,000 for each plaintiff. (App. A). Counsel for

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[10] The court gave the following instruction on punitive damage:

If you find for the Plaintiffs, Fulkerson and Herrensmith, against the Ford Motor Company under Instruction One, and if you are further satisfied from the evidence that the accident was caused by gross negligence on the part of Ford Motor Company, you may in your discretion award punitive damages against Ford Motor Company in addition to the damages otherwise authorized under these instructions in an amount at the discretion of the jury. If you award punitive damages, you will state the amount separately from the sum or sums awarded under any other instruction, and you may use Verdict Form G for this purpose.

"Gross negligence" means a wanton or reckless disregard for the lives and safety of other persons, including the Plaintiffs, or a willful or malicious act.

each party discussed the instructions in closing argument. All three counsels agreed to the underlying purpose of awarding punitive damages and explained to the jury that punitive damages are designed to punish those who engage in outrageous conduct and to act as a deterrent to discourage others from engaging in the same type of conduct in the future. (App. D).

REASONS FOR DENYING THE WRIT

This Court should deny Ford's Petition for Writ of Certiorari for the following reasons:

1. The issue presented in this case has no precedential importance. Kentucky altered its approach to punitive damages by enacting a statute in 1988 which contains all the features Petitioner advocates. It is, therefore, likely that this is the last pre-1988 accident governed by the pre-statutory "bare bones" approach to punitive damages.

2. In any event, Kentucky's pre-1988 procedures were consistent with this Court's holdings in *Haslip* and comport with due process.

3. Petitioner does not challenge the *amount* of punitive damages awarded as constitutionally excessive (it was roughly double the compensatory damages, and Ford itself suggested a three time compensatory multiplier). Thus, this case has no relation to the issue posed in *BMW v. Gore*.

I. THIS CASE LACKS ANY PRECEDENT SETTING VALUE IN THAT THE PUNITIVE DAMAGE INSTRUCTION GIVEN HERE APPLIED A PREVIOUS LAW OF KENTUCKY CONCERNING PUNITIVE DAMAGES ALTERED BY STATUTE IN 1988.

The punitive damage instruction given in this case applied a former rule of Kentucky law, unique to the state, which no longer exists and is unlikely to be raised in any other case. The accident, which is the subject of this case, took place in 1985. It was, therefore, stipulated by

all counsel that this case was governed by the punitive damage standards employed by Kentucky prior to 1988. (Pre-trial conference; Tape 30-12-92 VCR 100; 12/11/92; 16:41:34).

In 1988, Kentucky enacted a punitive damage statute supplanting common law as to all subsequent accidents. The statute requires proof "by clear and convincing evidence that the Defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." Ky. Rev. Stat. § 411.184. (App. B). A companion statute, Ky. Rev. Stat. § 411.186, establishes the procedures for imposing punitive damages and requires the issue of punitive damages be tried concurrently with all other issues presented in the case. (App. C). The statute defines oppression, fraud and malice and specifies punitive damages are "awarded against a person to punish and discourage him and others from similar conduct in the future." The statute further delineates the "factors" to be considered by the jury in determining the amount of punitive damages if warranted.[11] Finally, the statute declares it "supersedes any and all existing statutory or judicial law in so far as such law is inconsistent with the provisions of this statute." (App. B).

Kentucky courts now specifically instruct juries on the terms of the statute. *Hanson v. American National Bank*

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[11] Ky. Rev. Stat. § 411.186(2) provides in part as follows:

(2) If the trier of the fact determines that punitive damages should be awarded, the trier of fact shall then assess the sum of punitive damages. In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors: (a) the likelihood at the relevant time that serious harm would arise from the defendant's misconduct; (b) the degree of the defendant's awareness of that likelihood; (c) the profitability of the misconduct to the defendant; (d) the duration of the misconduct and any concealment of it by the defendant; and (e) any actions by the defendant to remedy the misconduct once it became known to the defendant. (App. C).

and Trust Co., 865 S.W.2d 302, 310 (Ky. 1993). Petitioner does not contend Kentucky's statutory procedure falls short of the requirements of due process. Indeed, it is evident the statute goes far beyond the requirements identified in this Court's decisions. The statute contains the very safeguards which Petitioner claims lacking in Kentucky's former procedure: a statement of the purposes of punitive damages; an enumeration of the criteria for determining entitlement to, and the amount of punitive damages; a requirement that entitlement to punitive damages be proved by clear and convincing evidence; and omission of the wealth of the Defendant as a factor in determining punitive damages.[12]

While we believe the procedures in the instant case (not governed by statute) satisfied due process, see Part II, *infra*, a decision respecting that issue would have no precedential importance for the future of Kentucky law, whose cases are now governed by the statute. Because Kentucky has a one-year statute of limitations for personal injury cases, it is doubtful there exist any other pre-1988 accident cases still pending. Moreover, we are aware of no other state that presently follows Kentucky's former procedure with regard to punitive damages, and Petitioner cites none. A decision in this case would have no precedential value elsewhere, either.[13]

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[12] In *Hanson*, the Kentucky Supreme Court expressly declared trial courts are not to suggest factors to the jury beyond those mentioned in the statute. Further, the statute allows only evidence of profitability of the misconduct, and not the wealth of the Defendant. 865 S.W.2d at 310.

[13] In an attempt to make this case seem worthy of certiorari, the Petition contains a lengthy critique of the procedures employed in a variety of other states. It is self-evident those procedures differ from the former Kentucky procedure. It is also self-evident that the scope of post-verdict review (which Petitioner contends is inter-dependent with the adequacy of jury instructions) will vary from state-to-state. If there are problems in other states, they ought to be addressed in cases coming from those states, not by some direction from the review of a former Kentucky procedure which is now defunct.

II. KENTUCKY'S PRE-1988 PROCEDURES FOR IMPOSING PUNITIVE DAMAGES WERE ENTIRELY CONSISTENT WITH THIS COURT'S HOLDINGS IN *HASLIP* AND COMPORT WITH DUE PROCESS.

Apart from the obsolescence of the issues presented in this case, they would not, in any event, warrant this Court's attention. Petitioner complains in this case, unlike *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the trial court did not instruct the jury that the purposes of punitive damages are to punish and deter. Under Kentucky's pre-1988 "bare bones" approach, however, the legal principles underlying the instructions "can be fleshed out by counsel in their closing arguments if they so desire." *Fulkerson*, 812 S.W.2d at 122. In this case, not only did Petitioner's counsel tell the jury that the purposes of punitive damages are to punish and deter, so did counsel for each of the Respondents. (App. D). Thus, the jury received unanimous advice from counsel for all parties that the purposes of punitive damages are to punish and deter, fulfilling exactly what this Court, in *Haslip*, ruled the jury should know.

Petitioner cites *Carter v. Kentucky*, 50 U.S. 288 (1981), and *Taylor v. Kentucky*, 436 U.S. 478 (1978), two decisions of this Court from criminal cases, holding the opportunity for counsel to "flesh out" or supplement the Judge's charge does not cure a constitutionally inadequate jury instruction. Assuming *arguendo* the principle applies equally to punitive damage cases, Petitioner ignores a crucial distinction between this case and the two cited: In *Carter* and *Taylor*, counsel for the prosectuion did not confirm the accuracy of the statements by defense counsel, thus leaving the possibility the jury would doubt their accuracy. In this case, Ford's counsel explained to the jury, in closing arguments, the purpose of punitive damages was to punish and deter. In their closing, counsel for Respondents expressly agreed the explanation provided by Petitioner's counsel was a correct statement of law. Counsel for both, Fulkerson and

Herrensmith, expounded in detail upon the proper underlying principles of punitive damages. (App. C). There is no doubt the jury knew, after these arguments, what the underlying public policy or principles were for awarding punitive damages.

Petitioner further argues the Constitution requires more elaborate punitive damage instructions here than in *Haslip*, because Kentucky courts do not provide the same degree of independent judicial scrutiny of the adequacy of the jury's verdict as Alabama. As demonstrated by the court's decision in *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759 (Ky. 1974), Kentucky courts provide a very detailed post-verdict review of challenged punitive damage awards. In *Hensley*, the jury returned a verdict in favor of the plaintiff, awarding $2,102.85 in compensatory and $20,000 in punitive damages. The defendant moved for a judgment notwithstanding the verdict as to the award of punitive damages. The trial court sustained the motion, holding the evidence fell short of the requirements necessary to sustain a verdict for punitive damages. The judge also conditionally granted defendant's motion for a new trial on punitive damages in the event the judgment notwithstanding the verdict was later reversed. The Kentucky Supreme Court reversed the trial court's decision concerning the sufficiency of the evidence to support an award of punitive damages. The court upheld, however, the trial court's decision granting a new trial on the excessive nature or the punitive damage award. The court recognized that the juries possess wide discretion in awarding punitive damages, but held:

> Litigants must not be left . . . to their arbitrary will, and be without remedy in cases where verdicts can be accounted for only upon the theory that they are the result of an improper sympathy, or unreasonable prejudice. In such cases it is one of the highest duties of a court to interfere; otherwise great wrongs will often result, and the party be remediless. 502 S.W.2d at 763-64.

Petitioner also ignores the explicit finding of the trial judge, in this case ruling on Petitioner's "Motion for Independent Review of the Punitive Damage Award" (Pet. App. 12a), that the facts of this case support the punitive damages award under "the standards in *Pacific Mutual Life Insurance Co. v. Haslip* . . ." (Pet. App. 12a). Clearly, the post-verdict review here was constitutionally adequate.

Petitioner's peroration about the impropriety of considering the wealth of the defendant in determining the amount of punitive damages has no application to this case. The trial judge did not instruct the jury to consider Ford's wealth, nor did counsel for Respondents invite the jury to do so. Indeed, Kentucky law in effect prior to 1988 prohibited introduction of such evidence. *Hensley*, 508 S.W.2d at 759.

Finally, Petitioner's contention that punitive damages should be dependent upon proof of wrongdoing by clear and convincing evidence was expressly rejected by this Court in *Haslip*, 499 U.S. at 23, n.11. As Kentucky now requires proof by clear and convincing evidence (App. B), this is hardly the case to revisit that ruling.

III. AS PETITIONER HAS NOT CHALLENGED THE AMOUNT OF PUNITIVE DAMAGES AWARDED AS CONSTITUTIONALLY EXCESSIVE, THIS CASE HAS NO RELATION TO ANY ISSUES RAISED IN *BMW v. GORE*.

Petitioner does not contend the *amount* of punitive damages awarded in this case is constitutionally excessive. As the amount is less than two times the compensatory damages awarded, and the misconduct here substantial (it hardly needs elaboration that a knowing failure of an automobile manufacturer to take precautions against the separation of wheels from its vehicles warrants strong punishment and deterrence),[14] any such contention would be

[14] Ford erroneously asserts throughout its Petition that Plaintiffs only evidence to support an award of punitive damages was the

specious. Indeed, Petitioner itself proposed a jury instruction indicating the propriety of a *treble* damage punitive award. (Pet. App. 38a). It follows then, that there is no reason for this Court to hold the Petition in this case pending a decision in *BMW of N. Am., Inc. v. Gore*, 115 S. Ct. 932 (1995), which involves only the constitutional limits on the amount of punitive damages, nor to remand this case for further consideration in light of whatever decision is rendered in *Gore*.[15]

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design change. As both the trial court and the court of appeals recognized, Plaintiffs presented evidence, through expert testimony of a former Ford employee and product-change request forms generated by Ford, that Ford knew a secondary retention feature was necessary to prevent separation of the spindle assembly. (Pet. App. 6a-7a, 11a-12a). Plaintiffs presented evidence that Ford knew of other claims that the shrink-fit assembly failed and recognized the need to alter the design to add a secondary retention feature in product request forms. This evidence is sufficient to support the jury's finding that the accident resulted from Ford's gross negligence in manufacturing a defective product and intentionally electing not to correct the defect or warn the public of the risk of separation. (Pet. App. 11a). The court of appeals unanimously concurred with the trial court's opinion that the record contained ample evidence to support an award of punitive damages. (Pet. App. 10a).

[15] Ford claims, under Kentucky law, reversal of the punitive damage awards in this case requires the reversal of the compensatory awards as well. This is a gross misstatement of Kentucky law. Kentucky courts have "*long* endorsed the view that damages may be separated from liability and that a case may be properly remanded for retrial of damages only." (Emphasis added). *Turfway Park Racing Assoc. v. Griffin*, 834 S.W.2d 667, 672 (Ky. 1992) (*Citing, Phipps v. Bisceglia*, 383 S.W.2d 367 (Ky. 1964); *Nolan v. Spears*, 432 S.W.2d 425 (Ky. App. 1968)).

In *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), the Kentucky Supreme Court held as a general rule a limited retrial *should* be granted. The court held "where a distinct and severable issue is to be decided, a trial on that issue alone is appropriate unless such a retrial would result in injustice." *Id.* at 146. This rule prevents a party who has already had his day in court on a particular issue from relitigating the same issue. *Scuddy Mining Co. v. Couch*, 295 S.W.2d 553, 554 (Ky. 1956). Only in cases involving inadequate damages, where liability is unclear, must the case be remanded for

CONCLUSION

Ford's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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retrial on all issues. *Nolan*, 432 S.W.2d at 427. A verdict awarding inadequate damages is regarded as representing a compromise on liability, so as to taint the entire verdict and require a new trial on all issues. *Id.*

Pedigo v. Carey, 650 S.W.2d (Ky. 1983), cited by Ford in support of its argument for a new trial on all issues, involved an appeal of an inadequate damage award where liability was contested, and as such, has no application to this case. The issue of damages is distinct and severable from the issue of liability and compensatory damages in this case. Ford already had its day in court on those issues and there is no reason to allow it to try them again. As Ford recognized in its motion for separate trials on the issues of causation and punitive damages, they are distinct and severable issues. Any retrial would be limited to punitive damages. *See also, Smith v. McMillan*, 841 S.W.2d 172 (Ky. 1992); *Beckner v. Palmore*, 719 S.W.2d 288 (Ky. App. 1986); *Phipps v. Winkler*, 715 S.W.2d 893 (Ky. 1986).